IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner*,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA; LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Association of Manufacturers hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Attorney for the Petitioner, Gateway Coal Company, and of the Attorney for the Respondent, Local No. 6330, United Mine Workers of America, has been obtained.

The consent of the Attorney for the Respondents, United Mine Workers of America and District No. 4, United Mine Workers of America was requested but refused.

The National Association of Manufacturers (NAM) is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial proportion of the nation's industrial employment. A substantial number of its members have collective bargaining agreements with labor organizations and may, therefore, be directly affected by the decision in this case.

In the day-to-day labor-management relations of industrial concerns, grievances often arise which involve some issue of safety. This case is of particular interest to the members of the NAM because a fundamental, far reaching issue is presented involving the authority of a court to order arbitration and enjoin a strike when there is a labor dispute over a matter related to safety. It is, therefore, of vital importance to have Section 502 of the National Labor Relations Act interpreted so that both employers and employees will understand their rights and obligations in such circumstances.

By this motion the NAM seeks leave to show that: (1) the decision of the Third Circuit conflicts with decisions of the Supreme Court and is repugnant to national labor policy favoring arbitration; (2) there is a conflict among circuits regarding the interpretation of Section 502 of the National Labor Relations Act; (3) the practical effect of the decision will ad-

versely affect the stability of labor-management relations.

The NAM, therefore, urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

BY RICHARD D. GODOWN
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INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers (NAM), in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

The crux of the decision of the Court of Appeals for the Third Circuit is that if employees believe in good faith that "abnormally dangerous" working conditions exist, they may strike during the term of their collective bargaining agreement regardless of the con-

tractual provisions or whether objective evidence shows that the conditions are in fact unsafe. It is submitted that the decision of the lower court is contrary to national labor policy favoring arbitration and it misconstrues the applicable decisions of this Court. The collective bargaining contract between Gateway Coal Co. and the United Mine Workers does not contain an express no strike clause. However, where a grievance is subject to final and binding arbitration this Court has held that a no strike agreement is to be implied. As the Court reasoned in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flower Company* 369 U.S. 95, 105 (1962): "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." Therefore, in the present case it is necessary first to consider whether the arbitration provisions of the contract cover the dispute so an agreement not to strike can be inferred.

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 582-83 and 584-85 (1960) this Court said:

> "An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> * * *
>
> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the excusion

clause is vague and the arbitration clause quite broad."

The contract involved in the present case provides for arbitration of "all disputes and claims" except for disputes which are "national in character", which the agreement specifically states are to be resolved by "free collective bargaining as heretofore practiced in the industry" (Petitioner's App. 207). There is no claim that the present dispute is covered by that exception.

The Third Circuit concluded that a dispute involving a matter of safety is not subject to arbitration because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration, and the practice of the parties has been to the contrary." (Opinion p. 5) That statement assumes that a matter is not arbitrable unless it is specifically stated in the contract which is contrary to the pronouncement of this Court in *Warrior & Gulf, supra.* Furthermore, the fact that the parties have been able to resolve past safety disputes without recourse to arbitration or strikes does not warrant the conclusion that the arbitration provisions of the contract are not applicable.

The lower court realized that its decision was grafting an exception onto the established rule and, after paying lip service to "a strong federal policy in favor of arbitration" stated: "Considerations of economic peace that favor arbitration of ordinary disputes have little weight here.... If employees believe the correctable circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate

their judgment to that of an arbitrator, however impartial he may be." (Opinion p. 5) The lower court supports its creation of an exception to the established rule by citing Section 502 of the National Labor Relations Act, which provides, ". . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." The Court held that employees may cease work because of a good faith apprehension of physical danger regardless of the objective evidence. That is the first time, so far as we have been able to ascertain, that the application of Section 502 has been held to turn solely on the good faith belief of employees when there was a lack of objective evidence to support the claim of the employees. The National Labor Relations Board and two Courts of Appeals have interpreted Section 502 differently.

The first clear statement by the NLRB on the meaning of Section 502 was made in *Redwing Carriers, Inc.*, 130 NLRB 1208 (1961) when it said:

> "It is necessary first to clarify the meaning of the term 'abnormally dangerous conditions' as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'"

The Board has consistently used that test in subsequent cases where Section 502 has been raised to justify violation of a no strike clause. Two Courts of

Appeals have agreed with the NLRB and held that competent objective evidence was necessary to apply Section 502. *N.L.R.B.* v. *Fruin-Colnon Construction Co.,* 330 F.2d 885 (8th Cir. 1964); *N.L.R.B.* v. *Knight Morely Corp.,* 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958), reh. denied 358 U.S. 858 (1958).

With the new construction of Section 502 by the Court below, requiring only a good faith belief by the employees involved that an "abnormally dangerous" condition exists, that Section becomes of major significance in all labor relations. It can be used to undermine a no strike clause and defeat the grievance/arbitration procedures established by the contract. The decision of the lower court is not merely an erroneous interpretation of some little used section of the Act. Rather, the decision introduces a new factor into labor-management relations. As pointed out by Circuit Judge Rosenn in his dissenting opinion:

> ". . . This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." (Opinion, pp. 9-10).

The practical effect of the decision is to encourage employees who want to strike during the term of a contract, but are bound by a no strike clause, to discover some safety grievance to use as a pretext for a strike. The present case presents just such an example: There was substantially more fresh air entering the mine, even with the obstruction, than was required by either state or federal laws. (Petitioner's App. 15) After the normal flow of air was restored, there was clearly no physical danger to miners, but they refused to work claiming that as long as the two negligent supervisors were responsible for safety procedures the miners' lives were jeopardized. The naked assertion was accepted by the lower court to justify the application of Section 502 and the refusal to enjoin the strike. The Court did not require any objective evidence to support the miners' contention that the premises were unsafe. This reasoning creates a loophole by which unions can escape the arbitration provisions of their contract and engage in a strike. Since some safety aspect can be easily injected into many grievances arising in the industrial community, the decision will have an unstabilizing effect on labor-management relations.

That strikes during the term of collective bargaining agreements are a national problem is shown by the remarks of Assistant Labor Secretary W. J. Usery, Jr., before the Annual Institute of Labor Law of the Southwestern Legal Foundation on October 27, 1972. He pointed out that approximately one-third of all strikes occur during the term of collective bargaining agreements. In order to cope with that problem he announced:

> "The Labor-Management Services Administration is currently funding a study by the Bureau of Labor Statistics which we hope will furnish

further insights into this problem. The study should reveal the issues which precipitate such strikes, whether these issues were major subjects of prior negotiations, whether the grievance procedures were followed, and whether the disputed issues were subject to binding arbitration." (81 LRR 227).

The decision of the lower court could aggravate this already serious problem of strikes during the contract term by permitting strikes on the bare assertion that the premises were unsafe, regardless of the contractual provisions or objective evidence relating to the alleged unsafe condition.

CONCLUSION

It is submitted that this court should grant the Petition for a Writ of Certiorari because the decision is contrary to national labor policy favoring arbitration; because the decision on the applicability of Section 502 is in conflict with the interpretation of other circuits and of the National Labor Relations Board; and because the proper application of that section is important in preventing strikes during the term of collective bargaining agreements and in the conduct of labor-management relations throughout the country.

Respectfully submitted,

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